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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
ELIJAH THOMAS,  
Defendants and Appellant.

A130350  
(Alameda County  
Super. Ct. Nos. 159964B)

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
MARK ANTHONY CANDLER,  
Defendant and Appellant.

A130494  
(Alameda County  
Super. Ct. Nos. 159964A)

Defendants Mark Anthony Candler and Elijah Thomas, members of an Oakland street gang, were charged with attempted murder in connection with the shooting of a member of a different gang. In addition, Candler was charged with three counts of firearms possession, based on a subsequent, unrelated investigation into his gang's activities. Criminal street gang sentence enhancements were alleged in connection with each of the charges. Defendants were convicted on all counts, and the allegations were found true. Both defendants contend the trial court abused its discretion in admitting a large volume of evidence unrelated to the charged crimes to prove the criminal street gang enhancement allegations and in permitting an expert witness to opine on their guilt. Each defendant also raises arguments relating only to his convictions. We affirm the

judgments against both defendants, although we remand for resentencing as to three of the charges against Candler.

## **I. BACKGROUND**

Defendants were charged in an amended information, filed March 5, 2010, with attempted murder (Pen. Code,<sup>1</sup> §§ 187, subd. (a), 664; count one) and shooting at an inhabited dwelling (§ 246; count two). Each charge was accompanied by allegations that defendants committed the acts in association with a criminal street gang (§ 186.22, subd. (b)(1)) and personally discharged a firearm, causing great bodily injury (§§ 12022.7, subd. (a), 12022.53, subds. (b), (c) & (d), 12022.5, subd. (a)). Candler was also charged with three counts of being a felon in possession of a firearm (former § 12021, subd. (a)(1); counts three, five, and six) and one count of possession of an assault weapon (former § 12280, subd. (b); count four). Each of these counts was alleged to have been committed in association with a criminal street gang (§ 186.22, subd. (b)(1)). One of the firearm possession counts was charged in connection with the shooting (count three), while the other three involved a separate incident.<sup>2</sup> Count four was also charged against a third defendant, April Williams, whose trial was severed. Williams is not a party to this appeal.

### **A. Pretrial Motions**

Prior to trial, Thomas moved to sever his trial from that of Candler. Thomas argued that as a result of the firearms possession charges against Candler there would be substantial testimony about the use, storage, and transportation of weapons at trial having nothing to do with his activities. This evidence would not be admissible in a separate trial, he argued, because he was not involved in the possession and it would be prejudicial to him. The prosecution responded that much of the evidence regarding Candler's possession of weapons following the shooting, including taped conversations between the

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The amended information also alleged Candler had two prior felony convictions and had served a prison term for one (§ 667.5, subd. (b)), but these allegations were stricken after the verdict was rendered.

defendants, would be admissible against Thomas because it related to the shooting and their gang membership. The court denied the motion, finding the two cases were of equal strength, were similarly inflammatory, and much of the evidence would be cross-admissible. At trial, the court instructed the jury to consider the evidence relating to each defendant separately.

Both defendants also moved to sever the shooting-related charges from the other three firearms possession charges against Candler, arguing the incidents underlying the two sets of charges were neither connected in their commission nor of the same class, as required for joinder. The court denied that motion, noting both incidents featured a firearms possession charge under (now former) section 12021. The court also concluded the gang membership evidence would be cross-admissible because it related to all charges, neither incident was more inflammatory, and the evidence relating to the two incidents was equally strong.

## ***B. The Evidence at Trial***

### ***1. The Shooting***

The shooting victim, Jermel Holloway, was a leader in an Oakland street gang known as Ghost Town. On the morning of June 30, 2006, Holloway was involved in an angry confrontation with Wendell Stevenson, a “close associate” of Candler who was a member of another Oakland street gang, the Acorn gang. Later that day, around 4:45 p.m., police officers in West Oakland heard over 30 gunshots fired in rapid succession, and one officer pursued a speeding white Dodge Magnum coming from the general direction of the shots, eventually losing the car in traffic. Shell casings from a handgun and an assault-type weapon littered the street near the corner of 31st Street and Martin Luther King, Jr. Way (MLK) and local homes were pock-marked, but presumed witnesses were unwilling to talk to the police. Investigating officers found Holloway at a local hospital with gunshot wounds in his legs.

It was not until almost two years later a person was located who would speak about the shooting. One of the participants in the Holloway/Stevenson confrontation, Aaron Burrell, told an investigating officer he was near 31st Street and MLK when three

cars pulled up. Candler emerged from a white Dodge Magnum, and Thomas left a blue BMW SUV. Thomas fired first, shooting at Holloway, whom Burrell saw sitting in a driveway. Candler began wildly and uncontrollably firing an assault rifle. Called to testify at trial, Burrell denied everything, but a tape of his interview was played for the jury.

Burrell's interview led police to two other eyewitnesses, neither an apparent member of the gangs. Both gave essentially the same account as Burrell during their interviews, with one of them placing Stevenson at the scene. Again, the witnesses denied everything on the stand, and tapes of their interviews were played for the jury.

With these statements in hand, an investigator attempted to interview Holloway, who was then in prison. Suffering grief over the recent killing of his best friend, apparently as a result of gang violence, Holloway agreed to talk to the investigator, but he refused to be taped. The investigator recounted the conversation at trial from his notes. Holloway said the Acorn and Ghost Town gangs had coexisted peacefully until his confrontation with Stevenson on the morning of June 30, 2006. Immediately afterwards, Holloway “ ‘had a feeling’ ” there would be retaliation. He was standing near MLK when Stevenson, Candler, and Thomas, all of whom he identified as Acorn members, drove up in a white Dodge Magnum and a blue BMW SUV.<sup>3</sup> Shots coming from behind hit Holloway in the buttocks; when he turned to look, he saw Candler and Thomas shooting at him. Candler had an assault weapon. As Holloway ran, he was hit in the legs. Holloway denied all knowledge of the events when called to testify at the preliminary hearing, only grudgingly acknowledging his injuries. By the time of trial, he had been killed.

Testifying in his own defense, Candler acknowledged being present at the scene of the shooting, but he denied firing any weapons. Candler said Holloway started the

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<sup>3</sup> Stevenson was not involved in the trial, having been killed a few months after the shooting in 2006.

firefight by shooting at him and was hit when Stevenson returned fire. Candler did not see Thomas there.

## ***2. The Firearms Possession Charges***

Three of the firearms possession charges against Candler arose out of a subsequent and unrelated wiretap investigation conducted against the Acorn gang in 2008. The evidence tying Candler to the weapons was largely in the form of recorded conversations between Candler, defendant Williams, and another Acorn gang member, Lorenzo Morris. The conversations were innocuous on their face. A police investigator, Steve Valle, qualified as an expert in “the investigation of gang-related crimes in West Oakland,” testified the conversations were in code and was allowed to interpret them for the jury.

According to Valle, gang members, in order to evade law enforcement, prefer to keep weapons at locations other than their residences. In the recorded conversations as interpreted by Valle, Candler was heard discussing firearms with a variety of people, including Thomas. In a series of calls, Morris asked to borrow a gun from Candler. Candler arranged to have Williams, who was keeping an assault rifle and another weapon for him, deliver a weapon to Morris in her purse.

Soon after these calls were recorded, police executed a search warrant at the home of Williams’s mother. In one bedroom police found a several packages of prescription medicine for Williams, an assault rifle in a gym bag under the bed, and a semi-automatic gun in the closet. The gun was inside a gift bag in a purse. The officers also found a handgun registered to Williams in her car, which was parked outside.

## ***3. Gang-related Evidence***

Primarily through Valle, the prosecution introduced evidence about gang activity in Oakland, the activities of the Acorn gang, and defendants’ gang membership. Valle testified Acorn is an “informal” gang of over 50 members, named after a local public housing project. It has several subgroups, a distinct territory in Oakland, unique signs and symbols, and two primary rivals, Ghost Town and another gang.

Valle said the “primary activit[y]” of Acorn was the commission of crimes. During the course of testimony stretching across three volumes of trial transcript, Valle

described a wide variety of specific crimes committed by some 18 Acorn gang members other than defendants, identified by name and crime. The crimes included murder, restaurant takeover robberies, other armed robberies, firearms possession and trafficking, narcotics trafficking, and assault. Introduced with the testimony about these gang members and their crimes were over 30 photographs showing many gang members, often in gang-related poses. Most of the photographs were either seized from the home of another gang member, taken from Candler's MySpace Web page, or seized from the glove compartment of Candler's car. In addition, Valle discussed a wide range of wiretapped telephone calls and text messages, many of which did not relate directly to the charged crimes. The court admitted as well evidence of Candler's tattoos, his cell phone contacts with other purported gang members, and his clothing as proof of his gang affiliation.

Of particular concern to the defense was the admission of a documentary video and two music CD's. The half-hour video, apparently posted on a Web site entitled "Hood2Hood.com," was self-evidently made with Candler's cooperation, if not under his direction.<sup>4</sup> It attempts to provide an account of gang life in the Acorn neighborhood through the words of gang members and other residents. As Valle characterized the video, "you have numerous Acorn gang members talking freely about what they do, particularly Mr. Candler . . . . They're flashing gang signs, showing off firearms, talking about shooting people, talking about how they're the most—they're the biggest force, the biggest gang in the area." The first 12 minutes consist of a boastful monologue by Candler, delivered from a stairwell and a hallway in the company of two other gang members. During the monologue, Candler discusses guns while his companions display them, recites his many nicknames, extols Acorn's local dominance, threatens persons who "snitch," exposes some of his claimed 27 gunshot wound scars, and names deceased gang members who are memorialized in tattoos on his forearms. The latter portion of the

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<sup>4</sup> Candler testified he made the video at the request of the operators of the Hood2Hood Web site. He explained it as a "perform[ance]" and "high-power faking" intended to promote his musical career.

video consists of interviews with other persons who discuss the pervasive violence in the neighborhood and their responses to it. The video is punctuated by the recorded sounds of gunshots, squealing tires, and screams, and by scenes of various presumed gang members displaying their weapons and tattoos, with occasional brief commentary by an unidentified narrator. At one point, Candler and others enter a room where they purport to prepare a mixture of heroin and cocaine. The court denied defendants' motion for a mistrial over the admission of the video, finding it "highly unusually probative" with respect to the gang allegations.

The two music CD's were produced by Candler and featured his rapping performances, among those of others. Pictures of Candler were prominently featured in their packaging. On one CD, Candler's initials, MAC, were spelled out with the words, "Mayhem," "Artillery," and "Currency." The CD featured a song called "Snitching Ain't Allowed," which concerns the dire consequences for persons who cooperate with law enforcement against the gang. Another Candler CD featured songs insulting a member of another gang, discussing weapons use, and threatening persons who cooperate with law enforcement.

#### ***4. Valle's Testimony About the Shooting***

In interpreting a telephone call between Candler and Thomas, Valle said they were discussing whether Holloway had been released from prison. Valle offered his opinion that the discussion of Holloway's release date was "very significant." When asked why, he explained, "number one, [Holloway] . . . [is] the actual leader of the rival gang that had been shot in [June] of 2006 where it's believed that Mr. Candler and Mr. Thomas partook in that shooting— [¶] . . . [¶] . . . And this creates concern, and it's obvious in the way they're talking about it because if [Holloway] is in fact out of custody, that raises concern to Acorn because Acorn had shot Mr. Holloway. . . . [¶] . . . [¶] And that causes concern for Mr. Thomas and Mr. Candler because now they have to be aware that a person they had just shot is out of custody, and now they have to be prepared for possible retaliation as a result of that shooting."

The court overruled a defense objection that Valle was offering an opinion about the defendants' guilt, saying, "I think the jury understands this as this witness's interpretation of these phone calls. That's the spirit in which they are to understand his testimony in regard to these phone calls. That's the extent."

### ***C. Verdict and Sentences***

Defendants were found guilty of all the charged offenses, and the associated enhancement allegations were found to be true. Thomas and Candler were sentenced to, respectively, 40 and 48 years to life in prison. Candler's sentence was comprised of 44 years to life on the attempted murder charge, a concurrent 40 years to life on the charge of shooting at an inhabited dwelling, a consecutive two years on the shooting-related charge of possession of an assault weapon, another consecutive two years on the other charge of possession of an assault weapon, and concurrent seven-year terms on the two charges of felon in possession of a firearm.<sup>5</sup>

## **II. DISCUSSION**

Defendants contend they were prejudiced by the denial of the motions to sever. They also contend the admission of the large volume of gang evidence, some of it particularly inflammatory, was unfairly prejudicial, and the trial court erred in permitting Valle to opine on their guilt. Candler additionally argues there was insufficient evidence to sustain both of the convictions for felon in possession of a firearm and contends sentence could be imposed on only one of the firearms possession convictions based on the weapons found at Williams's residence.

### ***A. Denial of Motions to Sever***

Both defendants challenge the trial court's refusal to sever the later firearm possession charges against Candler from the shooting-related charges, and Thomas challenges the trial court's refusal to sever trial of the charges against him from Candler's trial. The two issues are governed by different statutes, section 954, joinder of charges,

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<sup>5</sup> Because Thomas does not challenge his 40-years-to-life sentence, we need not explain it in detail.



and section 1098, joinder of defendants, and are subject to somewhat different considerations.

### **1. Severance of the Firearms Possession Charges**

Joinder of charges is governed by section 954, which permits an accusatory pleading to join different offenses if they are “connected together in their commission” or are “the same class of crimes or offenses.” Even if this statutory standard is met, the court has the discretion to sever joined offenses “in the interests of justice.” (*Ibid.*) “ ‘In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges, . . .’ [Citation.] [w]e consider first whether the evidence of the two sets of offenses would have been cross-admissible if the offenses had been separately tried. [Citation.] If the evidence would have been cross-admissible, then joinder of the charges was not prejudicial.” (*People v. Thomas* (2012) 53 Cal.4th 771, 798.) If the evidence is not cross-admissible, “we next inquire ‘whether the benefits of joinder were sufficiently substantial to outweigh the possible “spill-over” effect of the “other-crimes” evidence on the jury in its consideration of the evidence of defendant’s guilt of each set of offenses.’ [Citations.] We consider ‘[1] whether some of the charges are likely to unusually inflame the jury against the defendant; [2] whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and [3] whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.’ [Citation.] ‘We then balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state.’ ” (*Id.* at pp. 798–799.)

We initially review the denial of a motion to sever under section 954 for abuse of discretion on the basis of the circumstances known to the trial court when it ruled on the motion. If no abuse of discretion is found under this test, the judgment will be reversed only if the joint trial is shown to have caused gross unfairness amounting to a denial of due process of law. (*People v. Soper* (2009) 45 Cal.4th 759, 783.)

Defendants contend the trial court abused its discretion in denying severance of the firearms charges against Candler because (1) there was no cross-admissibility of

evidence between the charges; (2) the evidence associated with the firearms possession charges was likely to inflame the jurors; and (3) this evidence was likely to bias the jurors against Thomas, given his association with Candler.<sup>6</sup>

Defendants' argument there was no cross-admissibility of evidence with respect to the incidents underlying the charges—the shooting of Holloway and Candler's firearms possession—fails to take account of the gang enhancements alleged in connection with each charge. The evidence relating to the gang enhancements was essentially the same for both sets of charges and was therefore cross-admissible. (*People v. Burnell* (2005) 132 Cal.App.4th 938, 947.) Because the evidence was cross-admissible, the trial court did not abuse its discretion in denying the motion to sever. (*People v. Thomas, supra*, 53 Cal.4th at p. 798.)

Even if the evidence was not cross-admissible, the factors ordinarily used to support severance were not present. Contrary to defendants' claim, evidence from Candler's firearms possession charges was not likely to inflame the jury, at least not to a degree greater than the evidence of the shooting. Simple possession of an assault weapon or handgun pales in its inflammatory potential next to the use of those weapons in a cold-blooded attempt to kill. The evidence from the possession charges therefore added nothing to the inflammatory nature of the shooting charges. Nor was a strong case joined to a weak case or a capital case to a noncapital case. Accordingly, any prejudice from joinder of the two sets of charges did not outweigh the benefits to the state from joinder. (*People v. Thomas, supra*, 53 Cal.4th at pp. 798–799.)

Thomas separately argues he was prejudiced because his close association with Candler would have caused the jury to “have a strong emotional bias” against him as a result of the “veritable arsenal” found at Williams's house. As discussed above,

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<sup>6</sup> Defendants do not contend joinder of the charges was improper under section 954, which requires the offenses to be “connected together in their commission” or of “the same class of crimes or offenses.” The trial court's conclusion the incidents were of the same class appears to have been proper. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1075.)

however, the evidence tying Thomas to the shooting charges was strong, and that crime was more serious and disturbing than Candler's firearms possession. Any incidental prejudice from the firearms possession evidence would not have had a significant effect on the jury's verdict, particularly given the trial court's instruction to consider the evidence against each defendant separately. In light of the strength of the evidence relating to each of the incidents and the relative lack of prejudicial impact from the joinder, we find no gross unfairness amounting to a denial of due process of law for either defendant. (See *People v. Soper*, *supra*, 45 Cal.4th at p. 783.)

## **2. Severance of Thomas's Trial**

Joinder of defendants is governed by section 1098, which expresses a "preference" for joint trials by requiring defendants jointly charged to be tried together unless the court orders severance. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1296.) Separate trials "are usually ordered only " 'in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony' " " " (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 998) or "when 'there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.' " " (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40.)

We initially review the denial of a motion to sever under section 1098 for abuse of discretion on the basis of the circumstances known to the trial court when it ruled on the motion. If no abuse of discretion is found under this test, the judgment will be reversed only if the joint trial is shown to have caused " " " " "gross unfairness" amounting to a denial of due process [of law].' " " " " (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 150.)

Thomas contends the trial court abused its discretion in refusing to sever his trial from Candler's trial because the majority of the gang-related evidence, in particular the Hood2Hood video and the multitude of intercepted telephone calls, was related only to

Candler's activities, thereby precluding the jury from an independent evaluation of his guilt or innocence.<sup>7</sup>

While we recognize some of the gang enhancement evidence related specifically to Candler's activities, Candler's involvement was not the basis for the admission of this evidence. Rather, because Candler was a member of the gang, evidence of his activities was admissible to prove predicate offenses and the other elements of the gang enhancement under section 186.22. Further, much or most of this type of evidence did not relate directly to the activities of either defendant. Because it related to the gang enhancement allegation, all of this evidence, including the evidence of Candler's activities, would have been admissible in a separate trial of Thomas. Even the Hood2Hood video theoretically could have been admitted in a separate trial of Thomas, assuming it was not excluded under Evidence Code section 352, since it related to the activities of his gang. As a result, we find no abuse of discretion in the denial of the severance motion. The joint trial did not prevent the jury from making a reliable judgment about Thomas's guilt or innocence. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 40.)

### **B. Evidence of Gang Membership and Activities**

Defendants contend the abundant evidence of the activities of the Acorn gang and their role in it was cumulative and prejudicial.

It is generally recognized that evidence of a defendant's gang membership, when introduced in a prosecution unrelated to the gang's activities, tends to be prejudicial because it suggests a criminal disposition. (*People v. Pinholster* (1992) 1 Cal.4th 865, 945, overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) When such evidence is relevant to prove an element of the crime, however, it may be

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<sup>7</sup> Thomas does not argue the ordinary factors weighing in favor of severance— an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 998)—were present here.

admitted if, after careful scrutiny, it is found more probative than prejudicial. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

If a section 186.22 gang enhancement allegation is pleaded, the defendant's gang membership becomes an element of the prosecution's case. Section 186.22 imposes a sentence enhancement for a felony "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (*Id.*, subd. (b)(1); *People v. Loeun* (1997) 17 Cal.4th 1, 4.) "To establish a gang enhancement, a prosecutor must prove facts beyond the elements of the underlying offense. [Citation.] 'Accordingly, when the prosecution charges the criminal street gang enhancement, it will often present evidence that would be inadmissible in a trial limited to the charged offense.' " (*People v. Gutierrez* (2009) 45 Cal.4th 789, 820.)

To prove a section 186.22 gang enhancement, the prosecution must demonstrate that the defendant was a member of a "criminal street gang," as defined by the statute. "The act defines 'criminal street gang' as any ongoing association that consists of three or more persons, that has a common name or common identifying sign or symbol, that has as one of its 'primary activities' the commission of certain specified criminal offenses, and that engages through its members in a '*pattern of criminal gang activity*.'" ([§ 186.22], subd. (f), italics added.) A gang engages in a 'pattern of criminal gang activity' when its members participate in 'two or more' specified criminal offenses (the so-called 'predicate offenses') that are committed within a certain time frame and 'on separate occasions, or by two or more persons.' " (*People v. Loeun, supra*, 17 Cal.4th at p. 4.) The prosecution may prove a "pattern of criminal gang activity" through evidence pertaining to the charged offense and at least one other offense committed on a prior occasion by a fellow gang member. (*Id.* at pp. 4–5.) Similarly, the requirement that one of the gang's "primary activities" is the commission of the statutory crimes is generally proven through evidence of past crimes committed "consistently and repeatedly" by the defendant and other gang members. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323–324, italics omitted; see also *People v. Tran* (2011) 51 Cal.4th 1040, 1049–1051.)

The presence in this case of a well-supported gang enhancement distinguishes it from the decisions on which defendants place their primary reliance, *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*) and *People v. Bojorquez* (2002) 104 Cal.App.4th 335. In *Albarran*, the prosecution was unable to provide any direct evidence demonstrating the crime was gang-related, but it was permitted to introduce substantial gang evidence on the theory the crime was of a type commonly committed by gangs. (*Id.* at p. 219.) The court concluded the prosecution had failed to prove the gang allegation because no gang-related motive for the crime had been proven. (*Id.* at p. 227.) The conviction was reversed because, in the course of attempting to prove the gang allegation, evidence had been admitted that was irrelevant to the charged crimes but was “obviously prejudicial” and could have swayed the jury regardless of the defendant’s guilt. (*Id.* at pp. 227–228.) In *Bojorquez*, no gang allegation was made. The court held that evidence of common gang membership with the defendant was relevant to prove bias on the part of a defense witness, but much other gang-related evidence, such as the gang’s ethnic composition and activities, was of minimal, if any relevance. (*Id.* at pp. 342–343.) The court found the remaining evidence to be “plain[ly]” prejudicial and “inflammatory.” (*Id.* at pp. 344–345.)

This case is quite different. The prosecution’s evidence demonstrated the defendants’ gang affiliation was very likely the primary, if not the sole motive for the shooting. Candler’s gun possession was similarly an integral part of his gang activities. As a result, the gang enhancements pleaded in connection with the crimes were justified and supported, and the evidence of gang involvement could be introduced not only as relevant to the motive for the crimes but also as proof of the elements of the section 186.22 gang enhancement. The gang evidence was also relevant to explain the shooting eyewitnesses’ uniform recanting of their statements to police. The prosecution was therefore entitled to present evidence regarding the Acorn gang’s activities, including its criminal activities, notwithstanding the otherwise prejudicial effect of such testimony.

The allegation of a section 186.22 enhancement, however, did not give the prosecution an unlimited ability to introduce gang evidence. As defendants correctly

argue, the admission of gang evidence is always subject to Evidence Code section 352, which requires the exclusion of evidence that is more prejudicial than probative. While some evidence of a gang's criminal and other activities is necessary to prove a gang enhancement, the prosecution has no right to " 'over-prove' " the case or put on " 'all the evidence that they have.' " (*People v. Williams* (2009) 170 Cal.App.4th 587, 610.) "[N]either the prosecution nor the defendant has a right to present cumulative evidence that creates a substantial danger of undue prejudice [citation] or that unduly consumes the court's time . . . . [¶] . . . [¶] Although no bright-line rules exist for determining when evidence is cumulative, we emphasize that the term 'cumulative' indeed has a substantive meaning, and the application of the term must be reasonable and practical." (*Id.* at p. 611.) This is particularly true when the defendant's gang membership and the status of the gang are "not reasonably subject to dispute." (*Ibid.*; *People v. Leon* (2008) 161 Cal.App.4th 149, 169.) We review the trial court's admission of gang evidence under these circumstances for abuse of discretion. (*Albarran, supra*, 149 Cal.App.4th at p. 225.)

Valle's more than two days of testimony, accompanied by the substantial volume of pictorial, recorded, and other evidence, was substantially more than necessary to prove the status of the Acorn gang under section 186.22 and defendants' membership in the gang. Further, the Hood2Hood video, presented without explanation as though it were a documentary record of the Acorn gang's activities, provided an alarming picture of both Candler individually and his gang. Contrary to the trial court's characterization of the video as "highly unusually probative," the video does not contain sufficient detail about the gang's actual criminal activities to be *highly* probative of the elements of a section 186.22 enhancement.

Although we acknowledge the problematic nature of the abundance of gang evidence, we find any possible error to have been harmless, whether considered under the ordinary evidentiary standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, or the "beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), which defendants contend is applicable. First, the evidence on the

underlying charges was strong. With regard to the shooting, four different eyewitnesses provided essentially identical accounts, all four naming Candler and Thomas as the shooters.<sup>8</sup> Although two of these witnesses were from an opposing gang, the other two had no apparent gang affiliation. In addition, because all four witnesses were local residents personally familiar with defendants, their identification of the shooters appeared to be reliable. The firearms possession charges against Candler were backed up by recordings of his own conversations and confirmed by the police discovery of two weapons at Williams's residence, including one in a purse, as suggested by the conversations. While there would have been no reason to connect Candler to these weapons in the absence of the wiretap evidence, his own words, as recorded from the wiretaps, left little doubt.

Second, the introduction of *some* gang evidence was proper and unavoidable, given the close connection of the crimes to defendants' gang membership and the pleading of a gang enhancement. The prosecution was entitled to present evidence of the gang's name, identifying signs, and some past crimes, since these are the elements of a section 186.22 enhancement. If Valle had testified for only a single day, mentioned only half the number of past crimes, provided the jury with a much smaller number of photographs and only the wiretapped conversations relating to the charged firearms possession crimes, the effect would have been virtually the same as his actual testimony. The jury would have learned, in no uncertain terms, that defendants are members of an organization dedicated to the use of violence for unlawful purposes. Once this basic story had been told, any additional gang evidence added only marginally to the impact on the jury. Even the Hood2Hood video only made concrete and explicit the impression of gang activities created by Valle's testimony. For these reasons, we are persuaded beyond a reasonable doubt that any improper "overkill" made no difference to the jury's verdict. (See, e.g., *People v. Williams*, *supra*, 170 Cal.App.4th at p. 613 [admission of cumulative

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<sup>8</sup> In light of the gang-related nature of the shooting, the witnesses' recantation of their statements to police did not significantly diminish the probative value of their accounts.



gang evidence harmless when “[t]he admissible evidence overwhelmingly established defendant’s guilt of the substantive offenses and the truth of the gang enhancement allegations”]; *People v. Leon, supra*, 161 Cal.App.4th at p. 169 [admission of cumulative gang evidence harmless error].)

### **C. Valle’s Testimony Regarding the Shooting**

Defendants contend the trial court erred in overruling their objection to the portion of Valle’s testimony in which he purportedly offered his opinion as to defendants’ guilt with respect to the shooting. As explained above, when testifying about a telephone call between Candler and Thomas discussing Holloway’s release from prison, Valle said the call was “very significant” because “now they have to be aware that a person they had just shot is out of custody, and now they have to be prepared for possible retaliation as a result of that shooting.”

While an expert is not barred from offering an opinion solely because it “embraces the ultimate issue to be decided by the trier of fact” (Evid. Code, § 805), an expert is not permitted to offer an opinion as to the guilt of a defendant in a criminal prosecution. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 77.) “The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] ‘Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.’ ” (*Ibid.*) There is no “bright line” dividing permissible opinions that “embrace” an ultimate issue and impermissible opinions of guilt or innocence. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 651 (*Killebrew*), disapproved on other grounds in *People v. Vang* (2011) 52 Cal.4th 1038, 1049.) What is prohibited is “ ‘ “a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided . . . . There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision.” ’ ” (*Killebrew*, at p. 651.)

*Killebrew*, on which defendants rely heavily, was a prosecution for conspiracy to possess a gun found in a vehicle in which several gang members were riding. Because defendant was not in the vehicle at the time of the arrests, the evidence supporting his “possession” of the gun was slim. (*Killebrew, supra*, 103 Cal.App.4th at p. 649.) The prosecution’s case was presented largely through the testimony of a gang expert, who said the gang members likely had the gun to protect against retaliation for the recent killing of a member of a different gang. (*Id.* at p. 650.) As a result, the expert testified, all of the members of the gang would have been aware of the existence of the gun and could be charged with its constructive possession. (*Id.* at p. 652.) The court distinguished this testimony from the type of gang “culture and habits” testimony approved in earlier decisions. (*Id.* at p. 654.) Instead, the court reasoned, this was direct testimony about the knowledge and intent of the participants, the critical elements of a conspiracy charge. In fact, the expert’s testimony was the only evidence presented to establish these elements of the crime. (*Id.* at p. 658.) For that reason, the court found it to be “the type of opinion that did nothing more than inform the jury how [the expert] believed the case should be decided.” (*Ibid.*)

In contrast to the expert testimony in *Killebrew*, Valle’s testimony regarding the telephone call was not, and did not purport to be, an expression of opinion about the elements of the charged crimes. Valle was not the officer who conducted the witness interviews relating to the shooting. There is no indication he was involved otherwise in the investigation, nor was he presented as having been involved.<sup>9</sup> Valle was therefore in no position to offer a reliable opinion about defendants’ guilt on the shooting charge. Further, Valle’s testimony did not purport to be an opinion about defendants’ guilt. He was asked why defendants might have been interested in Holloway’s prison release date, and he offered his opinion about why that might be of interest to them: if they had shot

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<sup>9</sup> The volume of inculpatory evidence, of course, dramatically distinguishes this case from *Killebrew*, in which the court found the expert’s testimony to be the only evidence on the elements of the crime. Valle’s testimony was trivial, compared with the other evidence bearing on the shooting-related charges.

Holloway, they would be concerned about his release. There was no pretense this testimony constituted a considered opinion that, in fact, defendants were the shooters. Rather, it was an opinion about the meaning and significance of the call. Finally, the court instructed the jury to treat the testimony merely as Valle's interpretation of the phone call, not a pronouncement about the shooting.

This case is indistinguishable from *People v. Roberts* (2010) 184 Cal.App.4th 1149, in which the defendant was charged with conspiracy to murder after he was caught on wiretapped phone calls planning a gang killing. (*Id.* at pp. 1160, 1162–1163.) In testifying about the telephone calls, a gang expert offered opinions “that [the defendant] asked his child’s mother about a vehicle parked in front of a home in order to identify the home where [the opposing gang’s] party was to be held, and told her not to attend the party because he intended to return to the home to kill gang members,” that the defendant “was referring to a plan” in another conversation, and that during a third conversation “it was important to let [another gang member] know of the meeting to allow [the member] to coordinate simultaneous attacks on [the opposing gang] at the park and the party.” (*Id.* at p. 1193.) The court rejected the contention this testimony was impermissible opinion regarding the defendants’ guilt and distinguished *Killebrew*. (*Roberts*, at p. 1194.) Like the expert in *Roberts*, Valle was offering his understanding of the significance of the evidence presented to the jury, not offering an opinion as to the manner in which they should decide the case.

Even if Valle’s testimony had constituted impermissible opinion, however, it was harmless error to allow it. As noted, there was no pretense Valle had studied the evidence of the identity of the shooters and was in a position to offer an opinion about it. The jury had no reason to give any weight to Valle’s view. More important, the actual evidence bearing on defendants’ guilt of these charges was strong. Even if introduction of the evidence were considered a constitutional violation, triggering the *Chapman* standard, it was harmless.

#### **D. Sufficiency of the Evidence to Support Candler's Convictions**

Candler argues there was insufficient evidence to support his conviction on one of the felon in possession of a firearm charges relating to the weapons found in the search at the home of Williams's mother.

As discussed above, the police found two firearms in Williams's bedroom and one in her car when they executed the search warrant. There was no evidence linking Candler to the handgun found in Williams's car, which was registered to her. On the basis of this investigation, Candler was charged with one count of possession of an assault weapon and two counts of felon in possession of a firearm. When the prosecutor argued these charges in his closing, he relied on the two weapons found in the bedroom to support all three. The court, however, referred to three weapons when pronouncing sentence, suggesting its belief the two counts for felon in possession of a firearm related to the two non-assault weapons found during the search, including the one found in Williams's car. Candler argues his conviction for one of the two felon in possession of a firearm charges cannot be supported on the trial court's theory because there was no evidence linking him to the handgun in the car.

"Ordinarily, if an alternative theory of criminal liability is found unsupported by the evidence, the judgment of conviction may rest on any legally sufficient theory unaffected by the error, unless the record affirmatively demonstrates that the jury relied on the unsupported ground." (*People v. Sanchez* (2001) 26 Cal.4th 834, 851.) Assuming Candler's conviction on one of the felon in possession of a firearm counts could not be upheld on the basis of the handgun found in Williams's car, his convictions must be affirmed because the theory argued by the prosecution was adequately supported. The evidence linking Candler to the assault weapon found under Williams's bed provided support for both the possession of an assault weapon charge and one of the felon in possession of a firearm charges, while the other felon in possession charge was supported by the evidence linking him to the handgun found in the closet. Because Candler points to no evidence in the record affirmatively demonstrating the jury relied on the handgun

found in Williams's car for one of his convictions, rather than accepting the prosecutor's argument, we must find all three charges supported by the evidence.

***E. Candler's Multiple Sentences for Possession of the Weapons***

Assuming the three firearms possession charges were based on the two weapons found in Williams's bedroom, Candler argues section 654 precluded the imposition of more than one sentence for the two weapons because there was no evidence he had different criminal objectives for them. As a result, he contends, the trial court erred in not staying sentence on the two felon in possession of a firearm counts.

As the parties recognize, this issue is currently before the California Supreme Court. (See *People v. Sanders*, No. S191341, review granted Mar. 11, 2011; *People v. Jones*, No. S179552, review granted Mar. 24, 2010; *People v. Correa*, No. S163273, review granted July 9, 2008.) Having reviewed these decisions and the arguments of counsel, we are persuaded separate sentences were permissible under section 654 for both weapons.

In relevant part, section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (*Id.*, subd. (a).) "[I]t is well settled that section 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.] Whether a course of conduct is indivisible depends upon the intent and objective of the actor." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) "A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence." (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

In *People v. Kirk* (1989) 211 Cal.App.3d 58, the court held that section 654 barred multiple punishment for a defendant's simultaneous possession of two sawed-off shotguns, in violation of a former version of section 12020, subdivision (a). In response to *Kirk*'s ruling, the Legislature amended section 12001 to add subdivision (k), which

states: “For purposes of Section 12021, . . . notwithstanding the fact that the term ‘any firearm’ may be used in those sections, each firearm . . . shall constitute a distinct and separate offense under those sections.” (Former § 12001, subd. (k).) The trial court’s imposition of a separate sentence for each of the weapons Candler unlawfully possessed is fully consistent with the Legislature’s expressed intent that a felon’s possession of each firearm constitutes a distinctly punishable offense.

Contrary to Candler’s argument, there is factual support for the trial court’s implicit determination that his possession of each firearm had a “separate intent and objective.” Each weapon had its own ammunition and, therefore, could serve a different purpose or be used to commit a different crime. In addition, the fact that the firearms were of different makes, calibers, and size provides substantial evidence to support a finding that Candler harbored separate objectives for possessing each one.

#### ***F. Candler’s Multiple Sentences for Possession of the Same Weapon***

As noted, two of the three firearms possession charges against Candler must be assumed to have been supported by his constructive possession of a single weapon, the assault weapon found under the bed in Williams’s bedroom. Candler argues section 654 precludes his punishment under more than one of those two counts. This argument differs from the immediately preceding argument because these two counts were supported not by evidence of a divisible general activity—the possession of multiple weapons—but by evidence of Candler’s possession of the identical weapon.

We agree with Candler he cannot be punished twice for his possession of the same weapon.<sup>10</sup> Under section 654, the lesser of the two sentences associated with Candler’s possession of the assault weapon should have been stayed. “[R]ather than dismissing charges or imposing concurrent sentences, when a court determines that a conviction falls within the meaning of section 654, it is necessary to *impose* sentence but to stay the

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<sup>10</sup> The Attorney General does not address this argument. We take this as a concession on the merits. Although the issue was not raised below, this constitutes an unlawful sentence that can be challenged for the first time on appeal. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1140.)

*execution* of the duplicative sentence . . . . The sentencing court should stay execution of sentence pending completion of service of sentence upon the greater offense, with the stay to become permanent upon completion of that sentence.” (*People v. Duff* (2010) 50 Cal.4th 787, 796.) The greater offense, for which sentence must be imposed under section 654, is defined as the charge with the longest potential sentence, including any sentencing enhancements. (*People v. Kramer* (2002) 29 Cal.4th 720, 722–723.)

There was a further and related sentencing mistake not raised by either trial or appellate counsel. On the charge of possession of an assault weapon, the trial court imposed an eight-month term that it characterized as one-third of the middle term, implying the court believed the charge carried a middle term sentence of two years. In fact, former section 12280, subdivision (b), the statute under which Candler was charged and convicted, provided that a violator “shall be punished by imprisonment in a county jail for a period not exceeding one year, or by imprisonment in the state prison.” The statute made no provision for a lower, middle, and upper term. The trial court might have confused this sentence with that for felon in possession, which did carry a maximum sentence of three years and a middle term of two years. (§ 1170, subd. (h)(1); former § 12021, subd. (a)(1).) Because the maximum sentence for possession of an assault weapon was less than the maximum sentence for the felon in possession charge, the trial court was required to impose sentence on the latter charge and stay sentence on the former charge.

The trial court imposed a consecutive sentence for the assault weapon possession charge and allowed the sentences for the two felon in possession charges to run concurrently, without further increasing the determinate portion of Candler’s sentence. For this court merely to stay execution of the assault weapon charge would be inconsistent with the trial court’s intent in imposing such a sentence. Under these circumstances, the proper remedy is to remand for resentencing to provide the trial court “an opportunity to restructure its sentencing choices in light of our conclusion.” (*People v. Rodriquez* (2009) 47 Cal.4th 501, 509.)

### **III. DISPOSITION**

The judgment is affirmed as to Thomas. As to Candler, the trial court's sentence with respect to counts four, five, and six is vacated, and the matter is remanded for resentencing on these counts in a manner consistent with this decision. In all other respects, the judgment against Candler is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Dondero, J.